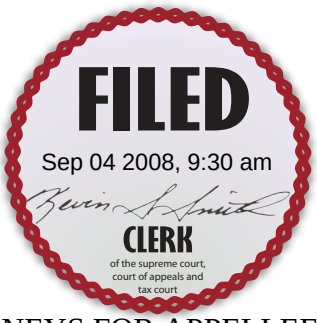

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IN THE
COURT OF APPEALS OF INDIANA

JAMES LEROY KILGORE,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 48A02-0803-PC-282
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MADISON SUPERIOR COURT
The Honorable Dennis D. Carroll, Judge
Cause No. 48D01-9906-CF-167

September 4, 2008

MEMORANDUM DECISION – NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

James Leroy Kilgore appeals the amended sentence imposed on his conviction for Dealing in Marijuana, as a Class C felony, and his Habitual Offender adjudication, following a jury trial. Kilgore presents a single issue for review, namely, whether the trial court erred by vacating the habitual offender enhancement to his sentence.

We affirm.

FACTS AND PROCEDURAL HISTORY

In January 1999, the State charged Kilgore with dealing in marijuana, as a Class C felony, and with being an habitual offender in the present case, Cause No. 48D01-9906-CF-167 ("CF-167"). A jury found Kilgore guilty and adjudicated him an habitual offender. In March, the trial court sentenced Kilgore to eight years, with an additional four years for being an habitual offender, to be served consecutive to the sentence he was then serving under Cause No. 48D01-9910-CF-287 ("CF-287").[1] On direct appeal from CF-167, this court affirmed Kilgore's conviction. Kilgore v. State, at *6 (Ind. Ct. App. September 28, 2001).

On November 21, 2007, Kilgore filed a pro se motion to correct erroneous sentence, contending that the court had imposed an illegal sentence in CF-167 when it ordered that habitual-offender-enhanced sentence to be served consecutive to another sentence that had been likewise enhanced. As a remedy, Kilgore asked the trial court to order the sentences in both cases to be served concurrently. The State conceded that

[1] As noted by the State, the presentence investigation report refers to a case under Cause No. 48D01-9910-CF-297 but does not list any case under Cause No. 48D01-9910-CF-287. We will use the Cause Number listed by the parties to refer to that case.

Kilgore's motion "may have merit" and requested the court to vacate the habitual offender enhancement in CF-167.

After a hearing, the trial court entered a memorandum order granting Kilgore's motion:

> The State concedes that Indiana law prohibits "stacking" habitual sentences. Accordingly, Kilgore must be afforded relief. However, Kilgore and the State dispute the nature of the required relief. Kilgore claims that the Court must order this cause [to be] served concurrent[] with 48D01-9910-CF-287. The State asserts that the Court must merely vacate the second habitual enhancement.
>
> Either remedy proposed above corrects the error of an erroneous sentence in this case. Nothing in Indiana law requires the Court to select the remedy preferred by [Kilgore]. The Court selects the remedy proposed by the State as more appropriate. Thus, the habitual offender enhancement under this cause will be vacated and a new sentencing order and abstract issued for a sentence of eight (8) years, to be served consecutive to 48D01-9910-CF-287.

Appellant's App. at 16. The court then entered an amended sentencing order on February 6, 2008 ("Amended Order") accordingly. Kilgore now appeals.

DISCUSSION AND DECISION

Kilgore contends that the trial court erred when it amended his sentence by vacating the habitual offender enhancement. In support, he argues that the trial court exceeded its statutory authority when it ordered the sentence in CF-167 to be served consecutive to the sentence in CF-287 because both had habitual offender enhancements. To remedy the error, he argues, the court was authorized only to order the sentences to be

served concurrently.[2] We cannot agree.

Indiana Code Section 35-50-1-2 grants the trial court discretion to impose consecutive sentences in certain circumstances. But Indiana Code Section 35-50-2-8, which authorizes the imposition of enhanced sentences for habitual offenders, is "silent on the question of whether courts have the authority to require habitual offender sentences to run consecutively[.]" Starks v. State, 523 N.E.2d 735, 737 (Ind. Ct. App. 1988). In Starks, this court construed the consecutive sentencing statute and the habitual offender statute to hold that trial courts are not authorized to order habitual offender sentences to be served consecutively. Id. To remedy the erroneous "stacking" of habitual offender sentences, the court ordered the two habitual offender sentences to be served concurrently. Id.

Relying on Starks, Kilgore argues that the only remedy for his erroneous sentence is for the court to order the enhanced sentence in the present case to be served concurrent with the enhanced sentence in CF-287. In support, he observes that a sentence enhanced under the habitual offender statute is to be treated as one sentence and not as a separate sentence, citing Collins v. State, 583 N.E.2d 761, 765 (Ind. Ct. App. 1991). Therefore, he argues, the act of vacating the habitual offender enhancement to the sentence imposed for the dealing in marijuana conviction is not authorized by law.

[2] The State contends that Kilgore's appeal addresses "the propriety of the amendment of the sentencing order . . . , not the execution of habitual offender sentences consecutively." Appellee's Brief at *5 (cites to the State's Brief are noted with "*" because the brief is not paginated as required in Indiana Appellate Rule 43(F)). We must disagree. The erroneous imposition of consecutive habitual-offender-enhanced sentences necessitated the amendment of the sentence, and Kilgore challenges the remedy chosen to address that error.

Kilgore is correct that a sentence enhanced by an habitual offender adjudication is to be treated as one sentence. But we disagree with his contention that the only available remedy for the erroneous "stacking" of habitual offender sentences is to order those sentences to be served concurrently. In Smith v. State, 774 N.E.2d 1021 (Ind. Ct. App. 2002), trans. denied, the trial court had ordered habitual offender sentences to be served consecutively. On appeal this court remedied the error by remanding to the trial court "with instructions to order that the habitual offender enhancements in the two causes be served concurrently . . . ." Id. at 1024. Making the enhancements concurrent while leaving the substantive portions of the sentences to be served consecutively remedied the "stacking" error.

Here, the trial court vacated the habitual offender enhancement to the sentence imposed for dealing in marijuana. Our supreme court has approved such a remedy:

> Frye also received a two-year sentence for the Theft conviction, enhanced by four years for being a Habitual Offender, and a 180-day sentence for the False Informing conviction. These sentences were imposed concurrent to the 40-year sentence for Burglary. In his appeal, Frye challenged the imposition of a habitual offender enhancement of both the Burglary and Theft sentences. The State conceded the error on this point, and the Court of Appeals vacated the Habitual Offender enhancement for the theft conviction. Frye v. State, 822 N.E.2d 661, 2005 Ind. App. LEXIS 96 (2005) (mem.). We summarily affirm the portion of the opinion of the Court of Appeals on this point. Ind. Appellate Rule 58(A)(2).

Frye v. State, 837 N.E.2d 1012, 1014 n.2 (Ind. 2005). Moreover, the effect on Kilgore's aggregate sentence is the same as if the court had ordered the habitual offender enhancements in this case and in CF-287 to be served concurrently, with the substantive

portions of the sentences to be served consecutively, as in Smith. Thus, Kilgore's contention is without merit.

Affirmed.

MAY, J., and ROBB, J., concur.